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ROBERT VACCARI, and JAKE ADAMS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 5:22-cv-00949-KK-(SHKx)

Assigned for All Purposes to:
Hon. Kenly K. Kato – Courtroom 3

**COUNTY DEFENDANTS' NOTICE
OF MOTION AND MOTION IN
LIMINE NO. 2 TO EXCLUDE
TESTIMONY, EVIDENCE,
ARGUMENT REGARDING
PORTIONS OF ROGER CLARK'S
OPINIONS; MEMORANDUM OF
POINTS AND AUHTORITIES**

Date: May 15, 2025
Time: 9:30 a.m.
Courtroom: 3

Trial Date: June 2, 2025

Complaint filed: 06/07/2022
FAC filed: 10/18/22
SAC filed: 01/13/23
TAC filed: 05/12/23

L.C., a minor by and through her
guardian *ad litem* Maria Cadena,
individually and as successor-in-interest
to Hector Mr. Puga; I.H., a minor by
and through his guardian *ad litem*
Jasmine Hernandez, individually and as
successor-in-interest to Hector Mr.
Puga; A.L., a minor by and through her
guardian *ad litem* Lydia Lopez,
individually and as successor-in-interest
to Hector Mr. Puga; and ANTONIA
SALAS UBALDO, individually,

Plaintiffs,

vs.

STATE OF CALIFORNIA; COUNTY
OF SAN BERNARDINO; S.S.C., a
nominal defendant; ISIAH KEE;
MICHAEL BLACKWOOD;
BERNARDO RUBALCAVA;
ROBERT VACCARI; JAKE ADAMS;
and DOES 6-10, inclusive,

Defendants.

**TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF
RECORD:**

PLEASE TAKE NOTICE that at the Pretrial Conference on May 15, 2025¹ at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3 of the above-entitled Court, located at 3470 12th Street, Riverside, CA 92501, Defendant's COUNTY OF SAN BERNARDINO, ROBERT VACCARI, and JAKE ADAMS (hereinafter "County Defendants") will, and hereby do, move the Court *in limine*, before jury selection or commencement of trial, for an order that Plaintiffs and Plaintiffs' counsel be precluded from referring to, or using any pleading, testimony, remarks, questions, or arguments which might inform the jury of portions of Roger Clark's opinions or report, preclude Roger Clark from testifying, and exclude Roger Clark's expert report as to the matters addressed in this Motion.

**DEFENDANTS' MOTION IS MADE ON EACH OF THE
FOLLOWING GROUNDS:**

Certain opinions offered by Roger Clark's report do not meet the standard of admissibility for expert testimony and/or are not relevant to any of the issues being decided in this case and are therefore excludable. *Fed. R. Evid.* 702, 401 and 403.

Defendants' Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the Declaration of Shannon L. Gustafson and exhibits, the papers and records on files herein, and upon such further oral and documentary evidence as may properly come before the Court.

¹ County Defendants' (County of San Bernardino, Jake Adams, and Robert Vaccari) have reached a tentative resolution subject to Board of Supervisor approval on April 29, 2025, as set forth in the parties Joint Report on Settlement. However, in an abundance of caution because the trial date is still set for June 2, 2025, County Defendants are submitting this filing to be in compliance with the Court's Scheduling Order in the event that the tentative settlement is not finalized.

1 This motion is made following the conference of counsel pursuant to Local
2 Rule 7-3 which included Defense counsel sending email correspondence on April 7,
3 2025, which detailed the grounds for their motions *in limine* which was then
4 followed up with a video conference with all parties on April 11, 2025. Plaintiffs'
5 counsel opposes this motion *in limine*.

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8 DATED: April 17, 2025

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11 By: /s/Shannon L. Gustafson
12 SHANNON L. GUSTAFSON
13 AMY R. MARGOLIES
14 Attorneys for Defendant,
15 COUNTY OF SAN BERNARDINO
16 ROBERT VACCARI, and JAKE ADAMS
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs have retained purported police practices expert, Roger Clark to opine
4 that the tactics used by Defendants prior to and during the shooting did not comport
5 with accepted standards of practice that would be expected from a reasonably well
6 trained officer confronted with the circumstances here. However, through Roger
7 Clark's opinions as stated in his Rule 26 report and confirmed during his deposition,
8 he intends to far exceed the scope of his permissible expert testimony in several key
9 respects on matters that he is either not qualified as an expert and/or are outside the
10 bounds of permissible expert testimony by invading the province of the jury and/or
11 concerning matters that are irrelevant. As such, for the reasons set forth herein, such
12 opinions should be excluded.

13 **II. LEGAL STANDARD**

14 Fed. R. Evid. Rule 702 allows admission of "scientific, technical, or other
15 specialized knowledge" by a qualified expert if it will "assist the trier of fact to
16 understand the evidence or to determine a fact in issue." Fed. R. Evid. Rule 702 also
17 provides that a witness may be qualified as an expert if "the testimony is based on
18 sufficient facts or data." "Where such testimony's factual basis, data, principles,
19 methods, or their application are called sufficiently into question . . . the trial judge
20 must determine whether the testimony has a 'reliable basis in the knowledge and
21 experience of [the relevant] discipline.'" *Kumho Tire Co. v. Carmichael*, 526 U.S.
22 137, 149 (1999). If the testimonial evidence fails in this regard, the expert opinion is
23 inadmissible. *Id.* In short, expert testimony must be both helpful and reliable.

24 "In applying Rule 702, the Court functions as a gatekeeper, determining
25 whether proffered expert testimony meets the requirements of Rule 702 by a
26 preponderance of the evidence." *In re Countrywide Fin. Corp. Mortgage-Backed Sec.*

1 *Litig.*, 984 F.Supp.2d 1021, 1026 (C.D. Cal. 2013); (citing *Daubert v. Merrell Dow*
2 *Pharms., Inc.*, 509 U.S. 579, 597 (1993)). The offering party must show by a
3 preponderance of the evidence, that (1) the expert is qualified to render the opinion;
4 and (2) the opinion offered has adequate factual and scientific support for that opinion.
5 *Daubert*, 509 U.S. at 592-93. “[A] witness may offer an expert opinion so long as it
6 meets the “scientific knowledge” and relevance requirements of Rule 702 and
7 *Daubert*.” *Beard v. United States Postal Service*, 2019 WL 257978 (N.D. Cal. Jan.
8 18, 2019) at *3. However, “expert testimony ‘can be both powerful and quite
9 misleading because of the difficulty in evaluating it.’” *Beard v. United States Postal*
10 *Service*, 2019 WL 257978 (N.D. Cal. Jan. 18, 2019) (quoting *Daubert*, 509 U.S. at
11 595 (citation omitted). Accordingly, in *Daubert v. Merrell Dow Pharms., Inc.*, 509
12 U.S. 579, 589 (1993), the Supreme Court directed trial judges to exercise their
13 “gatekeeping responsibility” to ensure that expert testimony be “not only relevant, but
14 reliable.” “The proponent of the witness bears the burden of establishing an expert's
15 qualifications, reliability, and helpfulness.” *In Re REMEC Inc. Securities Litigation*,
16 702 F.Supp.2d 1202, 1217 (S.D. Cal. 2010). “Rule 702 requires that expert testimony
17 relate to scientific, technical, or other specialized knowledge, which does not include
18 unsupported speculation and subjective beliefs.” *Guidroz-Brault v. Missouri Pacific*
19 *R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001)(emphasis added); *see Daubert*, 509 U.S.
20 at 590.

21 Further, even if the standards are met under *Daubert* and Fed.R.Evid. 702,
22 “[o]therwise admissible expert testimony may be excluded under Fed. R. Evid. 403 if
23 its probative value is substantially outweighed by the danger of unfair prejudice,
24 confusion of the issues, or undue delay.” *CFM Communications, LLC v. Mitts*
25 *Telecasting Co.*, 424 F.Supp.2d 1229, 1236 (E.D. 2005) citing *United States v. Hoac*,
26 990 F.2d 1099, 1103 (9th Cir.1993); *see Fed. R. Evid. 403*.

1 Several of Clark's opinions as set forth below, fail to meet this standard.

2 **III. CLARK'S PEPPER BALL OPINIONS SHOULD BE EXCLUDED**

3 It is undisputed that in their efforts to have Puga exit his vehicle, Sergeant
4 Vaccari deployed several volleys of pepper balls into the vehicle at various times.
5 When this was ineffective, Sergeant Vaccari attempted to strike Puga with a pepper
6 ball to gain compliance. While Sergeant Vaccari testified that he was not aiming for
7 Puga's head, Puga exclaimed on the video that he was struck in the eye and another
8 witness indicated that they saw an injury above Puga's eye later when he exited the
9 vehicle. From this evidence, Clark has offered his Opinion 1 that "[i]n consideration
10 of all the evidence reviewed, Sergeant Vaccari's deployment of the pepper balls to
11 strike Mr. Puga violated standard police practices and training." (Gustafson Decl. ¶2-
12 Exhibit A). To reach this conclusion, Clark merely regurgitated what he read in the
13 San Bernardino policies compared it to the evidence he reviewed and then then opined
14 that the evidence as he understood it, does not comply with what he read in the
15 policies. (Exhibit A- Opinion 1).

16 However, Clark candidly admitted at deposition that he has no specialized
17 knowledge or training with respect to the use of a pepper ball launcher and therefore
18 cannot qualify as an expert to render any opinions regarding the proper use of this
19 particular weapon. *Guidroz-Brault v. Missouri Pacific R.R. Co.*, 254 F.3d 825, 829
20 (9th Cir. 2001)("Rule 702 requires that expert testimony relate to scientific, technical,
21 or other specialized knowledge, which does not include unsupported speculation and
22 subjective beliefs.").

23 While Clark has set forth his opinion that Sergeant Vaccari's deployment of the
24 pepper balls to strike Puga violated standard police practice and training, he has not
25 established that he has any specialized knowledge in the standard practice and training
26 for the use of that particular weapon. Specifically, Clark has zero experience in how
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1 a pepper ball launcher operates, the effective range, or its accuracy to support his
2 opinions that Vaccari's use of it was inappropriate here. Rather, Clark candidly
3 admitted at deposition that pepper ball launchers were not in use when he was a law
4 enforcement officer and that he has never even taken a class as to how the weapon is
5 used. (Exhibit B – Clark Deposition: 27:11-16, 31:14-17). In fact, Clark's singular
6 experience with an actual pepper ball launcher came when he test fired it once over
7 ten years ago. (Exhibit B- Clark Depo 27:14-28:5)². Again his "test fires" more than
8 a decade ago, do not establish he has any specialized knowledge of the standards in
9 police practices in training for this weapon sufficient to opine on them. Clark's only
10 other stated experience comes in the form of shooting paint ball guns with his
11 grandkids, but he cannot state how a recreational paint ball gun is different from an
12 approved law enforcement pepper ball launcher, like the one used by Sergeant
13 Vaccari. (Exhibit B- Clark Depo- 28:6-30:13). Respectfully, Clark's recreational
14 activities with a paint ball gun make him no more qualified than a juror to assess the
15 actions of Sergeant Vaccari.

16 The jury can read the policy of the San Bernardino Sheriff's Department, the
17 same as Clark, and evaluate the witness testimony, the same as Clark, and decide for
18 themselves whether the use of force was reasonable based on this Court's jury
19 instructions on the law. There is no special expertise that Clark has on this subject.
20 On the other hand, allowing Clark to testify as a credentialed retirement law
21 enforcement officer gives undue weight to his opinions even though he has no
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25 ² Clark claimed that his one time testing was accepted by the 9th Circuit.
26 However, the two 9th Circuit opinions involving *Nelson v. City of Davis* which are
27 over ten years old, do not include any analysis as to Clark's qualifications as an
expert and therefore it is unclear if his qualifications were even challenged under
Fed.R.Evid. 702, let alone approved by the court. *See, Nelson v. City of Davis* 685
28 F.3d 867 (9th Cir. 2012) and *Nelson v. City of Davis* 571 F.3d 924 (9th Cir. 2009)

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1 expertise in this area and would therefore be unfairly prejudicial to Sergeant Vaccari.
2 *See*, Fed. R. Evid. 702, 403.

3 Further, Clark should not be allowed to simply regurgitate the testimony of
4 other witnesses and then speculate that Puga must have been shot in the eye. The
5 witnesses themselves can provide their testimony for the jury to assess whether Puga
6 was struck in the eye with a pepper ball, without Clark's assistance. *Fed. R. Evid.* 403.

7 **IV. CLARK'S LEGAL CONCLUSIONS SHOULD BE EXCLUDED**

8 By rule, "an expert witness cannot give an opinion as to [his] *legal conclusion*,
9 which is effectively an opinion on an ultimate issue of law." *Hangerter v. Provident*
10 *Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (emphasis in original).
11 Courts thus frequently bar experts from "employ[ing] judicially defined and/or legally
12 specialized terms in expressing [their] opinions." *See, Monroe v. Griffin*, 2015 WL
13 5258115, at *6–7 (N.D. Cal. 2015) (preventing Roger Clark from using terms such as
14 "grossly unlawful, unnecessary, and excessive violence")(emphasis added);
15 *Valtierra v. City of Los Angeles*, 99 F.Supp.3d 1190, 1198 (C.D. Cal. 2015)
16 (preventing Clark from testifying that "the use of force was 'excessive' or
17 'unreasonable,' under the circumstances"). This is so because such "opinions"
18 generally are not helpful to the trier of fact. *Valtierra, supra*, 99 F.Supp.3d at 1198
19 (finding "several of [Roger] Clark's opinions, as currently formulated, are not helpful
20 to the jury because they constitute impermissible legal conclusions."). In the context
21 of "excessive force" cases like this one, "an expert's 'opinion as to what "current law"
22 "mandates" or whether defendants were "legally" "justified" in using the force
23 applied against [the plaintiff] usurps the jury's role.'" *Godinez v. Huerta*, 2018 WL
24 2018048, at *5 (S.D. Cal. 2018) (internal citations omitted).

25 Unfortunately, this is not the first time Clark has attempted to invade the
26 province of the jury by telling them which result to reach through legal conclusions
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1 couched as “opinions.” Thankfully, district courts have been diligent in limiting his
2 attempts to offer impermissible “opinion” evidence. *Cooke v. City of Stockton*, 2017
3 WL 5447999, at *5 (E.D. Cal. 2017) (“[Roger] Clark may not use judicially defined
4 or legally specialized terms in providing his opinions. Thus, Clark may not opine as
5 to whether the officers used ‘excessive force,’ or whether their use of force was
6 ‘unreasonable under the circumstances.’ These are legal conclusions drawn from
7 disputed facts; in other words, they preemptively answer questions the jury, not Clark,
8 must resolve.”); *Godinez, supra*, 2018 WL 2018048, at *5 (precluding Roger Clark
9 from expressing any opinions in “use of force” case “using judicially defined or
10 legally specialized terms”); *Colbert v. Cty. of Kern*, 2015 WL 8214204, at *2 (E.D.
11 Cal. 2015) (precluding Roger Clark from “testify[ing] that using the taser in the
12 circumstances confronting [the defendant] was excessive or unreasonable or the
13 like.”); *accord Rascon v. Brookins*, 2018 WL 739696, *4 (D. Ariz. Feb. 7, 2018)
14 (cautioning that “[Mr. Clark] should not volunteer an opinion that the officers acted
15 unconstitutionally or exercised excessive force. Legal opinions or conclusions are
16 excluded from Clark’s testimony”).

17 This Court should follow the lead of the many district courts cited herein and
18 preclude Clark from using similar terms during his testimony here that are riddled
19 throughout the opinions in his expert report and will undoubtedly be uttered at trial:

20 1) Opinion 1: Puga did not pose an **immediate threat** of death or serious bodily
21 injury” when the pepper balls were deployed.

22 2) Opinion 3: Puga “***did not present an immediate threat or serious bodily***
23 ***injury***” as he was running, and an officer’s “overreaction” in using deadly force is
24 “***excessive force.***”

25 3) Opinion 4: Puga was “***no longer an immediate threat of death or serious***
26 ***bodily injury***” after he had fallen to the ground.

1 4) Opinion 6: he repeatedly referenced the officers’ “*unnecessary use*” of
2 lethal force.

3 (Gustafson Decl. ¶ 2, Exhibit A – Opinion 1, 3, 4, and 6)

4 It is for the jury to determine whether Puga was an *imminent threat* and
5 whether the use of force was *excessive or unnecessary*, not Clark. This Court should
6 therefore order Clark to not use specialized legal terms that are for the jury to decide
7 such as whether the force was excessive, unnecessary or unreasonable or whether
8 Puga posed an imminent threat and instead he should be ordered to limit his opinions
9 as to what would be expected of a reasonably trained officer under the circumstances.

10 **V. CLARK’S COMMENTARY ON THE VIDEO ARE INADMISSIBLE**

11 Clark’s purported “expertise” is police practices, not forensic video analysis
12 and editing. (Gustafson Decl. ¶ 4, Exhibit C –Clark’s CV). As such, he is not qualified
13 to opine as an expert in video analysis and yet several of opines sound it large part as
14 to what he himself hears or sees on the video. *See Fed. R. Evid.* 702.

15 For example, Clark has offered the opinion that there were 15 rounds fired *after*
16 Puga fell to the ground based only on the *sounds* he heard in the video. (Exhibit B –
17 Clark Deposition: 124-25:125:21, Exhibit A- Opinion 4). However, even Plaintiff’s
18 “video” expert could not confirm that all the sounds equate to gunshots. (Exhibit G-
19 Kimmis Depo 91:9-17; 95:10-20; 99: 20-25; 100:1-20). If Plaintiff’s video expert
20 cannot make this leap, certainly Clark should be excluded from offering any testimony
21 as to the number of shots fired *after* Puga was on the ground. There are also other
22 examples of Clark merely narrating the video in his opinions which should not be
23 permitted as follows:

24 1) Opinion 3- “The video shows Mr. Puga running straight ahead, with both
25 arms pumping back and forth in a running motion, never turning around towards the
26 officers and never pointing either had back toward the officers.” The jury can see
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1 Puga's actions and make their own determinations.

2 2) Clark testified on several occasions that he cannot see the gun in the video,
3 despite testimony of the law enforcement officers and other witnesses that there was
4 a gun in Puga's hand, essentially replacing his video review observations for the
5 witness testimony. (Exhibit B- Clark Depo- 66:2-11; 67:2-15; 73:5-17). The jury can
6 review the video and listen to the witness testimony and make their own
7 determination.

8 3) "In the video, Deputy Adams appears to reach the portion of the curb where the
9 painted curb meets the unpainted curb at the time the shots started and the front
10 passenger door was open during their approach and during the shooting. Subsequent
11 pictures taken of the scene show the part where the painted curb meets the unpainted
12 curb lines up with the rear of the right back tire of the Expedition." (Exhibit A- Clark
13 Report)- Again Clark is not a video expert and distances in videos and photographs
14 can be distorted. As such, Clark should not be permitted to use his personal
15 observations of the video and photos to opinion on the position of Adams or Vaccari
16 at the time of the shooting. This is outside his area of expertise.

17 Because the jury can plainly see and hear for themselves, Clark's narrations
18 when he has no specialized video expertise are far from helpful and should be
19 excluded. See *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 843 (9th Cir. 1995)
20 (expert testimony "as to what could be heard in a tape-recorded conversation" was
21 properly excluded because "hearing is within the ability and experience of the trier of
22 fact."); *United States v. Fernandez*, 134 F.3d 379, *4 (9th Cir. 1998) (unpublished)
23 (affirming exclusion of expert testimony because "[a] jury would be just as capable
24 of examining a still photo.")

25 Clark should be limited to providing opinions as to what a reasonably well
26 trained officer would be expected to do through hypothetical questions as opposed to
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1 providing testimony about the evidence based on his review of the video.

2 **VI. CLARK'S OPINION 4 IS SPECULATIVE**

3 Clark offers his conclusory opinion 4 that "Office Rublacava, Officer
4 Blacwood, Sergeant Kee and Deputy Adams violated standard police practices and
5 training when they shot at Mr. Puga after he had fallen to the ground." (Exhibit A-
6 Opinion 4). This opinion implies that all four officers fired shots during this time
7 frame. However, Clark confirmed at deposition that he *could not state* which
8 officers fired after Puga was on the ground. (Exhibit B – Clark Deposition: 77:11-
9 13). As such, this opinion is speculative and he should not be permitted to opine
10 that all four officers continued to shoot after Puga was on the ground.

11 **VII. CLARK'S OPINIONS 8, 9, 10 ARE IRRELEVANT**

12 Clark's opinions 8, 9, and 10 refer to the Bottens, which have filed a separate
13 lawsuit against Defendants. Indeed, Plaintiffs' attempt to consolidate these cases were
14 previously rejected by the court. (Gustafson Decl. ¶ 5, Exhibit D – Civil Minutes
15 Order regarding Consolidation). Despite the court's articulation that consolidating the
16 cases for trial would not promote judicial convenience and any convenience is
17 outweighed by prejudice and confusion, Plaintiff is trying to reinsert their claims
18 through the opinions of Clark.

19 During the meet and confer, Plaintiffs conceded that Opinion 8 was largely
20 irrelevant, except that they still intended to use the portion where Clark opines "a
21 reasonable officer facing the facts and circumstances confronting the involved
22 officers knew or should have known that there were innocent bystanders in the
23 residential homes surrounding the incident location in the middle of the night."
24 (Gustafson Decl. ¶ 6, Exhibit E – Email). However, even this limited opinion is
25 unnecessary to assist the trier of fact. The jury will see through photographs that there
26 are homes in close proximity to the shooting and will be advised this occurred in the
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1 early morning, when people are typically at home.

2 As to opinions 9 and 10 Plaintiff refused to stipulate to exclude them on the
3 grounds that they “relate to the officers’ tactics.” (Exhibit E). However, Clark’s
4 opinions reference the tactics leading up to the shooting of Puga are already
5 extensively set out in Opinion 6. In contrast, Opinion 9 deals specifically with an
6 opinion that Defendants did not clear their background such that the Bottens were
7 injured and Opinion 10 focuses on the failure to evacuate the neighborhood and set
8 up a perimeter again resulting in injuries to the Bottens. (Exhibit A).

9 However, whether the officers used “bad” tactics generally or with regard
10 specifically to the safety of the Botten family simply has no relevance to this matter
11 where the jury is being asked to decide whether the officers used excessive force on
12 Puga and/or whether their pre-shooting tactics were negligent thereby causing Puga
13 to be shot. There is nothing in the failure to clear background, or to set up a perimeter
14 that bears on these issues. The relevant inquiry under *Graham v. Connor*, 490 U.S.
15 386 (1989), is whether the force used against Puga a was objectively reasonable under
16 the totality of the circumstances confronting the defendants at the time. Whether the
17 Bottens felt free to leave their residence, the Bottens’ injuries themselves, and
18 Defendants’ alleged failure to evacuate the neighborhood, are entirely irrelevant and
19 an undue consumption of time. *See Fed. R. Evid.* 403. Moreover, should the focus be
20 on the Bottens and their injuries, as well as expert testimony as to what could have
21 been done to prevent it, the jury may become angry over what happened with the
22 Bottens and conclude in hindsight the shooting of Puga was not justified resulting in
23 unfair prejudice. *Fed. R. Evid.* 403.

24 **VIII. CONCLUSION**

25 For all the foregoing reasons, Defendants respectfully request that this Court
26 grant Defendants’ motion *in limine*

1 DATED: April 17, 2025

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3
4 By: /s/Shannon L. Gustafson
5 **SHANNON L. GUSTAFSON**
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants County of San Bernardino and Deputy Breana Fite, certifies that this brief contains 3,236 words, which:

x complies with the word limit of L.R. 11-6.1.

☐ complies with the word limit set by court order dated .

DATED: April 17, 2025

LYNBERG & WATKINS
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By: /s/ Shannon L. Gustafson
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